IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1079 OF 2002

Polisha Ganpat Pawar,
Convict Prisoner No.C-3700,
Nashik Road Central Prison,
Nashik. ...Appellant

Versus

The State of Maharashtra
(at the instance of Sinner P.S.) ...Respondent

.....

Mrs.Ruchita Dhuru, appearing as amicus curiae for Appellant.

Mr.Y.S.Shinde, A.P.P. for Respondent.

.....

CORAM: A.M.KHANWILKAR, J.

AUGUST 28, 2006.

ORAL JUDGMENT :

1. This Appeal by accused No.1 takes exception to the Judgment and Order passed by the Vth Additional Sessions Judge, Nashik dated April 12, 2002 in Sessions Case No.175 of 2001. The Appellant along with two other accused was charge-sheeted and tried for offence punishable

under Sections 395, 397, 457, 380, 342, 427 read with Section 34 of the Indian Penal Code (hereinafter referred to as the 'IPC').

2. The prosecution case is that two more accused were involved in the commission of the crime in question, but as they were absconding, the trial proceeded only in respect of three accused. Insofar as accused Nos.2 and 3 are concerned, they had filed separate appeal against order of conviction and sentence dated 2nd April 2002. However, it appears that their Appeal has been dismissed for non-prosecution.

3. As mentioned earlier, the present Appeal is filed by accused No.1 through jail. The prosecution case is that on the night of 16th July 2001, when the Investigating Officer Sudam Dada Walke was doing night patrolling duty at 22.30 hours, he was proceeding towards Vavi, Nandur Shingote accompanied by police constables Thakare and Khairnar and the jeep was near Village Pangri, they received message on wireless from A.S.I. Bhandagale of Sinnar Police Station that there was

information that thieves have come to the house of Haribhau Londhe near Kela Factory, Sinnar. On receiving such wireless message, the said police party proceeded towards the field of Haribhau Londhe. It was learnt that the thieves had proceeded towards M.I.D.C., however, they could not be traced. That around 2.15 hours, A.S.I. Bhandagale gave call that he received message that the accused had come to Kande Mala. Accordingly, the police party headed by Sudam Dada Walke, Police Inspector (PW 8) went to Kande Mala and noticed the damage done by the thieves. Again at 4.15 hours, another wireless message was received from A.S.I. Bhandagale that information has been received from one Laxman Golesar that there was theft in the house of his servant Haribhau Sayaji Gode (PW 1) and that Haribhau Gode was severely beaten by the accused, and his property was stolen. Accordingly, the police party proceeded towards the field of Prabhakar Laxman Golesar. When they reached the spot, they were informed that injured Haribhau Gode was taken to clinic of Dr.Atre at Sinnar. The police party inspected the house of Haribhau Gode and noticed that one quilt in the house was

drenched with blood, the household articles were found scattered. The police party made attempt to trace the culprits. P.W. 8 issued directions to A.S.I. Bhandagale to record the First Information Report (F.I.R.) of Haribhau Gode who was in the clinic of Dr.Atre at the relevant time. It is alleged that when P.W.8 was chasing the culprits on Nashik-Pune Road, when the police jeep reached near Ghulewadi Shiva, they noticed six male persons and four women were walking on the streets with bundles of clothes on their heads and some of them were having bags in their hands. As P.W.8 entertained some doubt, the said persons were asked to stop, but on seeing the police jeep, the said persons started running away. The police party, however, caught hold of three culprits and the remaining four/five persons fled away. The police party took personal search of accused in the presence of panch and it was noticed that accused No.1 was found in possession of 56 items, consisting cash amount, gold ornaments, clothes and wrist watches. One kukri and one dragger were also found in possession of accused No.1. Articles were recovered from other accused as well. The said articles including

gold and silver ornaments were identified by P.W.1 Haribhau Sayaji Gode and P.W.5 Sakhubai Haribhau Gode. Suffice it to observe that after the investigation was complete, charge-sheet came to be filed and the matter was committed to the Sessions Court at Nasik for trial. The accused were charge-sheeted for the offence referred to in the earlier part of the Judgment. The Trial Court framed following charge :

> "I, Shri M.R.Puranik, 3rd Adhoc Addl. Sessions Judge, Nashik, do hereby charge you,
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> 1. Polisha Ganpat Pawar,
> age 50 years, r/o Kod,
> Ta. & Dist. Usmanabad.
>
> 2. Inku alias Somya Motiram Pawar,
> age 20 years, r/o. Tambyachi Wadi,
> Ta.Barshi, Dist.Solapur.
>
> 3. Santosh Waman Bhosale,
> age 19 years, r/o.Tambyachi Wadi,
> Ta.Barshi, Dist.Solapur.
>
> as follows:
>
> That you all accused persons along with absconding persons in between the night of 16/7/2001 and 17/7/2001 in between 11 p.m. to 4.10 a.m. at Khalwadi and Kanadi Mala (Sinnar Shivar) you committed dacoity in the house of complainant Haribhau Sayaji Ghode, and you thereby committed an offence punishable U/s 395 of I.P.C. and

within my cognizance.

You all accused persons alongwith absconding persons on the above mentioned date, time and place while committing dacoity you used deadly weapons like Koyta, knives and caused grievous hurt to complainant and you thereby committed an offence punishable U/s 397 of I.P.C. and within my cognizance.

You all accused persons along with absconding persons on the above mentioned date, time and place committed lurking house tress pass by night by entering into the house belonging to complainant and used as human dwelling after sunset and before sunrise in order to commit the commission of the offence of dacoity and you thereby committed an offence punishable U/s 457 of I.P.C. and within my cognizance.

You all accused persons along with absconding accused persons on the above mentioned date, time and place committed theft of gold Dorle, watch, pair of silver chains, clothes, worth Rs.3000/- and from the house of witness No.2 committed theft of gold ear rings, silver chain, two silver chains and cash of Rs.500/- blanket worth Rs.3100/- as well as from the house witness No.3 you committed theft of cash of Rs.500/- and clothes worth Rs.800/- from the house witness no.4 clothes worth Rs.800/- from the house witness no.4 clothes and cash of Rs.500/- worth Rs.700/- and from the house of witness No.5 clothes worth Rs.250/- and from the house of witness no.6 clothes worth Rs.100/- total Rs.7950/- and thereby committed an offence punishable u/s.380 of IPC and within my cognizance.

You all accused persons along with absconding persons on the above mentioned date, time and place you wrongfully

confined the other prosecution witnesses by latching their doors from outside and thereby committed an offence punishable u/s 342 of I.P.C. and with my cognizance.

And I hereby direct that you be tried by this Court for the above mentioned charges."

4. The Trial Court, however, after analysing the evidence on record, convicted the accused Nos.1 to 3 for offence punishable under Sections 395, 395 read with Section 397 of the IPC. The accused were, however, acquitted of offence punishable under Sections 457, 342 read with Section 34 of the IPC as also of Section 380 read with Section 34 of IPC. The operative order passed by the Trial Court reads thus :

"O R D E R

1. Accused No.1 to 3 are hereby convicted of the offences punishable under sec.395, 395 r.w. 397 of Indian Penal Code and under sec.457, 342 r.w. 34 of the Indian Penal Code. They are acquitted of the offence punishable under Sec. 380 r.w. 34 of the Indian Penal Code.

2. Accused No.1 to 3 are sentenced to suffer R.I. for seven years and to pay fine of Rs.2000/- each (Rupees Two thousand), i.d. to suffer further R.I.

for nine months for the offences punishable under sec.395, 395 r.w. 397 of I.P.C. and under Sec.457 r.w. 34 of I.P.C.

3. They are also sentenced to suffer R.I. for one year for the offence punishable under sec.342 r.w. 34 of the Indian Penal Code.

4. Substantive sentences shall run concurrently.

5. The accused are in custody since 17/7/2001 till today. Therefore, their custody period is given set off as per Sec.428 of the Criminal Procedure Code.

6. Two pairs of silver chains, one Citizen make wrist watch, gold Mangalsutra containing ten beeds weighing 5 grams be returned to the informant P.W.1 Haribhau Sayaji Ghode after the appeal period is over.

7. Seized property i.e. camera, walkman, wrist watches of Quartz and Titan make, gold rings stand confiscated to the State. They be sold in public auction and sale proceeds thereof including seized cash amount of Rs.1850/- be credited to the State after the period of appeal is over.

8. Seized Koyta and knives are confiscated to the State. They be sent to the District Magistrate, Nashik for disposal according to law.

9. Rest of the property, being worthless, be destroyed after the appeal period is over."

5. The Appellant/accused No.1 alone is before this Court taking exception to the Judgment and

Order passed by the Trial Court.

6. After having considered the rival submissions and perusing the evidence on record with the assistance of Counsel appearing for the parties, in my opinion, the view taken by the Trial Court to record finding of guilt against the Appellant for offence punishable under Sections 395, 395 read with Section 397 of the IPC is a possible view on the analysis of the evidence on record. The opinion recorded by the Court below as articulated in Paras 27 and 28 of the impugned Judgment, to me, appears to be the correct approach and will have to be upheld. The reasons noted in Paragraphs 27 and 28 read thus:

> "27. At the cost of repetition, it is observed by this Court that evidence of P.W.1 Haribhau and P.W.5 Sakhubai inspire confidence. Their evidence remained unshaken in their respective cross examinations. Both have identified the accused persons. The description of the accused persons is given by P.W.1 Haribhau in F.I.R. Stolen property has also been identified by above both witnesses. The accused persons were apprehended within eight hours of the occurrence of Gorewadi, Sinnar and police were assisted by other persons for apprehending the accused

persons. I also do not find any infirmity in the evidence of P.W.7 Bhanudas and in the testimony of P.W.6 Jaywant. It is seen from the evidence of I.O. P.W.8 Sudam Walke that he was apprised by his staff from time to time in respect of whereabouts of the culprits and lastly the accused were traced by them early in the morning of 17/7/2001 near Gorewadi, Shivar. The identification of accused No.1 Polisha has not been disputed. A suggestion to that effect has been given to P.W.1 in his cross examination. Various wrist watches, silver chains and clothes were found in possession with accused persons and they gave no explanation pertaining to the property described in Exh.11, 12 and 13. There is presumption U/s 114(a) of the Evidence Act that a man who is in possession of stolen goods soon after the theft is either thief or receiving the goods knowing them to be stolen unless he can account for his possession. In the present case the accused were found in possession of the stolen property soon after the occurrence and they gave no account pertaining to the property found in their possession. Part of the property found in possession with the accused persons was identified by P.W.1 Haribhau and P.W.5 Sakhubai. The accused were also identified by the above two witnesses in test identification parade. Therefore, presumption U/s 114(a) of the Evidence Act is made applicable in the present case.

28. From the perusal of FIR Exh.9 and from the evidence of Haribhau and Sakhubai it is made clear that there were in all five persons out of which four thieves entered in their house and one was outside the house. Accused No.2 Inku assaulted P.W.1 Haribhau on his forehead and shoulder as a result of which he sustained bleeding injury. One of the thieves snatched gold Mangalsutra from the person

of Sakhubai. From the testimony of above two witnesses in all five thieves including accused No.1 to 3 have committed offence of dacoity in the house of the informant. All the accused persons were armed with deadly weapons i.e. Koyta and knives. Seizure memos Exh.11 to 13 disclose that Koyta and knives were found in possession with accused No.1 to 3. Evidence of all the prosecution witnesses is found reliable and points argued by learned defence counsel Adv.Adke are found not favour. The prosecution witnesses have no reason to give incriminating evidence against the accused persons. The point which is urged by learned defence counsel that since the number of accused is only three, therefore charge against the accused persons U/s 395 of I.P.C. has not been made out is incorrect. It is specifically mentioned in the chargesheet and in the charge framed against the accused persons that accused No.1 to 3 alongwith other absconding persons have committed offence of dacoity by entering into the house of P.W.1 Haribhau and forcibly stole his property by causing injuries to him. Simply because co-accused were not traced, it is no ground to submit that offence of dacoity has not been proved. From the evidence on record it is proved that number of culprits were more than five, but only three persons i.e. accused no.1 to 3 were apprehended and remaining co-accused were succeeded in escaping from the clutches of the police. At the time of commission of offence of dacoity the accused persons have also committed lurking house trespass by entering into the house of P.W.1 Haribhau in order to commission of offence punishable with imprisonment. Therefore I hold that accused No.1 to 3 have committed offence punishable U/s 457 of I.P.C. since the accused were armed with Koyta and knives and they assaulted P.W.1 Haribhau at the time of committing

> dacoity, therefore the accused are also guilty u/s 395 r.w. 397 of I.P.C. Injury certificate given by P.W.4 Dr.Jire discloses that one grievous injury was found on the scapula of P.W.1 Haribhau and it is measuring 20 x 7 x 7 cm. It was caused within six hours. Dr.Jire has also opined that above injury was caused by sharp weapon i.e. Koyta or knife. Injury certificate Exh.17 and evidence of P.W.4 Dr.Jire shows that two simple injuries were also found on the person of P.W.1 Haribhau and it is proved that those injuries were caused by the accused at the time of commission of offence of dacoity. Thus it is proved that accused No.1 to 3 used deadly weapons and thereby caused grievous hurt to P.W.1 Haribhau. Therefore, they are held guilty for having committed offence punishable U/s 395 r.w. 397 of I.P.C."

7. Each of the reason stated by the Trial Court is germane and is supported by the material on record which does not warrant any interference. The Appeal is devoid of merits.

8. Counsel for the Appellant, however, made unsuccessful attempt to contend that the approach of the Trial Court is inappropriate, as it is established from the record that no independent witness has been examined by the prosecution to corroborate the evidence of the complainant (PW 1). This argument, though attractive, does not commend

to me. In the first place, there is not even a suggestion put to the Investigating Officer (PW 8) or for that matter the complainant (PW 1) that some other person unconnected with the family of the complainant (PW 1) was present on the scene at the relevant time. It cannot be ignored that the house of PW 1 was invaded by the accused party at the dead of the night around 4.00 O'clock. In any case, as no suggestion has been put either to the complainant or the Investigating Officer that it was possible for the prosecution to examine such other person to corroborate the evidence of P.W.1 and was not done, suffice it to observe that the argument that prosecution has not examined independent evidence, cannot be the basis to discard the version of PW 1 and PW 5 which has been found to be credible and rightly accepted by the Trial Court. In other words, it is not possible to take the view that the prosecution version has been successfully challenged by the defence in any manner before the Trial Court.

9. The next contention urged before this Court on behalf of the Appellant is that the

description of the stolen property was not given in the F.I.R. nor has been deposed by the prosecution witness in evidence before the Court. There is no substance in this submission. Indeed, the description of property is not spelt out in the F.I.R. It will have to be remembered that F.I.R. has been registered by A.S.I. Bhandagale in hospital on instructions of PW 8 who had visited the scene of offence and found that the injured (PW 1) was already taken to the nearby doctor. However, it has come in evidence that the articles were recovered from the custody of accused persons after they were arrested by the police party when they attempted to flee. The panchanama of recovery of articles has been drawn which has been proved in evidence. Besides, the articles were immediately identified by the complainant (PW 1) as well as PW 5, which fact is also noted in the panchanama. Even that fact has been proved in evidence. Besides, PW 1 gave description of the articles, amongst others, gold dorla (article No.1), which was snatched by the thieves from PW 5 who was wearing the same at the relevant time. PW 1 has also spoken about the articles taken away by the

thieves which were in the iron trunk, consisting of his shirt and clothes of his children, two pairs of silver chains belonging to his daughter, one wrist watch and so on. There is absolutely no cross-examination on the point that the articles so described by the prosecution witness or for that matter identified by the prosecution witness, did not belong to the complainant. It has also come in evidence that the entire house of complainant (PW 1) was in shambles. The same was invaded by the accused persons. On his visit, PW 8 noticed that the items in the house were lying in scattered position. Thus understood, the fact that the description of the stolen property was not given by the complainant (PW 1) in his statement recorded by A.S.I. Bhandagale, will make no difference to the veracity of the prosecution.

10. It was next contended that the evidence of panch witness (PW 2) examined by the prosecution, was not reliable. In the first place, no such grievance was made before the Trial Court. In any case, even on close scrutiny of the evidence of PW 2, I see no merits in this submission. In fact,

there is no cross-examination to doubt the credentials of PW 2. There is no suggestion as to why PW 2 should depose against the accused persons. The cross-examination is too general to accept the argument that evidence of panch witness (PW 2) was not reliable. The panchanama has been proved by the Investigating Officer (PW 8). The contents of the panchanama are also proved by PW 8. The evidence of panch witness (PW 2) corroborates that part of the evidence of the Investigating Officer. Suffice it to observe that there is no merits in the grievance made by the Appellant that the evidence of panch witness (PW 2) is unreliable.

11. It was then contended that the fact about iron trunk, which was taken away by the accused persons from the house of complainant (PW 1), the evidence regarding the recovery thereof, is inconsistent. On this premiss, it is submitted that the theory that the articles in the iron trunk belonging to complainant (PW 1) was taken away, becomes doubtful and lends credence to the arguments of the defence that the entire case

against accused persons is concocted version. The argument seems to be attractive, however, the same is founded on misreading of the prosecution evidence. This argument is advanced firstly by pointing out the statement made by PW 1 in Paragraph 1 at page 32 that the articles in question were in the iron trunk which was found lying in the field of one person. Whereas, the spot panchanama Exhibit 14 refers to iron trunk found in the house of the complainant (PW 1). Finger prints were noticed on the said iron trunk which have been related to accused No.2 on the analysis done by the finger print expert (PW 6). It was submitted that if the trunk was taken away by the accused and was found in the field as stated by PW 1, the prosecution version becomes doubtful, as the trunk was lying in the house of PW 1, as mentioned in the said panchanama. This argument is fallacious. There is no cross-examination to this effect. No question has been put to either the complainant (PW 1) or the Investigating Officer (PW 8) to confront the said witnesses with this prosecution case. There is nothing on record to indicate that the iron trunk which was taken away

by the accused as claimed by the complainant (PW 1) was the only iron trunk in the house of the complainant. If so, one more iron trunk, if found in the house of the complainant, does not belie the case of the prosecution, much less, the entire case of the prosecution as was canvassed before this Court. The iron trunk found in the house of the complainant (PW 1) was relevant to establish the involvement of accused No.2, as the finger prints found on the said trunk were resembling with the finger prints of accused No.2. Accordingly, the argument advanced before this Court by the Appellant that there is inconsistent evidence with regard to the recovery of stolen iron trunk is of no avail.

12. It was then contended that the case against the Appellant could not have proceeded for charge of Section 395 of the IPC. The evidence of PW 1 and PW 5 was not enough to proceed against the Appellant for that charge. It was submitted that the invaders in the house of the complainant (PW 1) were less than five persons. PW 1 as well as PW 5

have deposed that four persons had entered their house. This argument, however, overlooks the version given by PW 1 and PW 5 that four persons had entered the house of complainant (PW 1) and one person was seen standing outside the house. Both the prosecution witnesses have consistently spoken about this fact. It is also seen from their evidence that after the four persons forced their entry in the house of the complainant (PW 1), the inmates could not leave their place and were forced to part with their belongings. From the evidence of Investigating Officer (PW 8), it is seen that more than five persons were seen moving together with the stolen articles recovered after chasing the said persons, out of whom the accused (three persons) were arrested. Moreover, it is noticed that in the cross-examination of the Investigating Officer (PW 8) or for that matter, complainant (PW 1) and PW 5, who are the eye-witnesses, no suggestion whatsoever is given that the persons engaged in the commission of crime were only four in number. Taking overall view of the matter, the grievance made by the Appellant that the accused could not have been prosecuted for offence under

Section 395 of the IPC, does not commend to me.

13. It was lastly contended that the test identification parade held in respect of the accused is vitiated. Twofold arguments were canvassed before me. In the first place, the test identification parade was conducted almost more than after one month from the date of arrest of the accused. The accused were arrested on 17th July 2001, but the Investigating Officer sent request letter to the Tahsildar only on 13th August 2001. Pursuant to the said request letter, the Tahsildar (PW 7) held the test identification parade only on 31st August 2001. It was argued that delay in conducting test identification parade was fatal. More so, no attempt was made by the Investigating Officer to explain such delay.

14. It was next contended that the dummies who were arranged for the test identification parade were not resembling the age of the accused/appellant. Accused/appellant at the relevant time, was 50 years of age, whereas, the

dummies present during the test identification parade were in the age group between 19 and 53. If so, the test identification parade as held, will be of no avail to the prosecution.

15. I shall deal with the first contention that there was unexplained delay in conducting test identification parade, which vitiates the identification of Appellant/accused. Indeed, some time was spent by the Investigating Officer. In the first place, no such grievance was made before the Trial Court. Secondly, on considering the evidence of the Investigating Officer (PW 8) and the Tahsildar (PW 7), who conducted the test identification parade, it is seen that the delay was on account of procedural formalities. Interestingly, there is no suggestion in the cross-examination either of PW 7 or PW 8 that such delay was used by the prosecution to facilitate the police machinery to enable the prosecution witnesses to see the accused persons. No such suggestion has been given to the eye-witness PW 1 or PW 5. Suffice it to observe that no foundation has been laid by the defence to contend that the

delay in conduct of test identification parade was deliberate or that the prosecution has been benefited on account of such delay in any manner.

16. Taking the second contention that the dummies arranged for the test identification parade were not resembling the accused persons, will also have to be rejected on the same reasoning as indicated above with regard to the argument of delay in conduct of test identification parade. Even this point was not agitated before the lower Court. Moreover, no foundation has been laid by the defence to succeed on this contention. From the evidence of the Tahsildar (PW 7), it is seen that he had taken care to ensure that the dummies were comparable with the appearance of the Appellant/accused. From the panchanama, it is seen that three dummies were of 53 years of age and other two were of 41 years and 40 years respectively and only two persons were in the age group of 19 to 20. Be that as it may, there is no cross-examination whatsoever on this point either of the Investigating officer (PW 8) or the Tahsildar (PW 7) or for that matter, PW 1 and PW 5,

who have identified the accused. In fact, from the cross-examination of PW 1, it is seen that PW 1 and PW 5 had enough opportunity to identify the accused persons. PW 1 has stated that there was electricity in his house and that, he did not put off the light at night time. The electricity bulbs were not damaged by the thieves in incident. In other words, there was enough light in the house to identify the invading person in the house. Suffice it to observe that even the last contention regarding test identification parade is of no avail to the Appellant.

17. It was also faintly argued that the test identification parade becomes doubtful being not in conformity with the established norms, as the Appellant was not given opportunity or informed about his right to change his dress and place before he was introduced to another witness for identification. This aspect can be answered straightaway by referring to the evidence of PW 7. In his evidence, he has proved the memorandum of panchanama and the contents thereof. In the panchanama, it is noted that the accused was given

opportunity to change his dress and place before the next witness was to be introduced, if he so desired. However, the accused preferred to remain at the same place and did not show any inclination for changing his dress.

18. It was lastly contended that the Appellant has been falsely implicated. The Appellant belongs to Pardi Community, which is known to be criminal Tribe. The Appellant in fact was engaged in the business of selling photos of God and Goddesses and Perfumes. The Appellant had no concern with the alleged offence. It is not possible to accept this submission in the wake of clinching evidence adduced by the prosecution evincing the involvement of the Appellant in the commission of crime. The eye-witnesses gave description of the Appellant. They have identified the Appellant. The articles stolen from the house of complainant (PW 1) have been recovered from the custody of the Appellant, who made attempt to escape along with the other accused. Those articles have been identified by the prosecution witnesses. The identity of the Appellants is established in the test

identification parade. The Court below in Paragraphs 27 and 28 of the impugned Judgment has considered all the relevant circumstances which go against the Appellant. In my opinion, the view taken by the Trial Court being possible view and for the reasons noted in the earlier part of this Judgment, does not warrant any interference. It is well established that merely because another view is possible on the basis of the same evidence, that by itself, cannot be ground for interference by the Appellate Court. Something more is required to be established from the record to persuade the Appellate Court to overturn the finding of fact reached by the Trial Court on the basis of analysis of evidence, especially when the view so taken, can be a possible view.

19. Counsel for the Appellant also argued that the quantum of sentence be reduced and more particularly because the Appellant has already undergone substantial part of the sentence. This contention cannot be accepted having regard to the mandate of Section 395 of the Indian Penal Code for

which offence, the Appellant has been found guilty. Hence, that argument also does not commend to me.

20. Accordingly, this Appeal fails. The same is dismissed.

21. Court expresses word of gratitude for the Advocate, who has appeared as amicus curiae to espouse the cause of the Appellant/accused.

22. Copy of this order be forwarded to the Appellant, as the Appeal is filed through jail.

A.M.KHANWILKAR, J.